FILED
JUL 25 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM 1955

No. 265

M & M TRANSPORTATION COMPANY and STONE'S EXPRESS, INC.,
Appellants,

against

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Appellees,

and

ST. JOHNSBURY TRUCKING COMPANY, INC., and HINSCH TRANSPORTATION CO., INC.,
Intervener Appellees.

JURISDICTIONAL STATEMENT

On Appeal from the Judgment of the United States District Court, District of Massachusetts

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St. Johnsbury Trucking Company, Inc., and Hinsch Transportation Co., Inc.,
Intervener Appellees.

On Appeal from the Judgment of the United States District Court, District of Massachusetts

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JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the United States District Court for the District of Massachusetts entered on January 25, 1955, dismissing their complaint in an action to set aside an order of the Interstate Commerce Commission and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

Opinion Below

The majority and concurring opinions of the District Court for the District of Massachusetts are reported in 128 F. Supp. 296 and annexed hereto as Appendix A. The opinions of the Interstate Commerce Commission are reported in 59 M.C.C. 747 and 60 M.C.C. 129.

Jurisdiction

This suit was instituted, under the provisions of 28 U.S.C. Section 1336, 2321-2325, to set aside an order of the Interstate Commerce Commission. The judgment of the District Court was entered on January 25, 1955 and notice of appeal was filed in that Court on March 11, 1955.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28 U.S.C. Sections 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this cause. *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U. S. 33; *United States* v. *Capital Transit Company*, 338 U. S. 286; *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U. S. 515; *McLean Trucking Company Inc.* v. *United States*, 321 U. S. 67; *Florida* v. *United States*, 282 U. S. 194.

Questions Presented

1. Does the phrase "consistent with the public interest" as contained in Section 5(2)(b) of the Interstate Commerce Act (49 U. S. C. Section 5(2)(b)) require an affirmative and basic finding that the proposed unified motor carrier service will be responsive to the transportation needs of the shipping public and did the District Court commit error

n it held that the phrase means, in effect, "not incon-
nt with the public interest" and, therefore, is, as the
urring opinion suggests (Appendix "A", p. 34) de-
otive of a "mere neutral status."

May the Interstate Commerce Commission approve
pplication for the unification of two motor carriers,
r Section 5(2)(b) and (c) of the Interstate Commerce
where it fails to find that there is a public need for
nified service.

Where the District Court, upon review of an order
he Interstate Commerce Commission, concludes that
finding of fact, which it does not identify, is not
orted by substantial evidence, must the order of the
rstate Commerce Commission be vacated.

Did the order of the Interstate Commerce Commis-
approving the unification of two motor carriers under
ion 5(2)(b) constitute a departure from prior norms
out an adequate explanation so that its order must be
ted.

Did the Interstate Commerce Commission, in its order
roving the application under Section 5(2)(b), make
uate and basic findings and were the findings, as made,
orted by substantial evidence on the whole record.

Did the denial by the District Court of the Appel-
s' request, under Rule 36 of the Rules of Civil Pro-
re for the United States District Court, for an admis-
that the Commissioners of the Interstate Commerce
mission did not have the whole record before them
r to the issuance of their final order constitute a de-
of due process of law and a violation of the Adminis-
ve Procedure Act and may the Commissioners of the
rstate Commerce Commission be required to disclose
ther the whole record of the proceedings were before
n before the issuance of a final order.

Statutes Involved

Sections 5(2)(a)(b)(c)(e), 209(b) and 410(c) (49 U.S.C. Sections 5(2)(a)(b)(c)(e), 309(b) and 1010(c)) of the Interstate Commerce Act, as amended, and Sections 7(c) and 10(e) (5 U.S.C. Sections 1006(c) and 1009(e)) of the Administrative Procedure Act.

Statement

Appellants are motor carriers engaged in the transportation of general commodities in interstate commerce under Certificates of Public Convenience and Necessity issued by the Interstate Commerce Commission.

Prior to November 27, 1951, St. Johnsbury Trucking Company, Inc. (hereinafter called "St. Johnsbury") was engaged in the transportation of general commodities over regular routes extending from Boston and Springfield, Massachusetts to all points in Vermont and many of the principal points in New Hampshire and Maine. Hinsch Transportation Co., Inc. (hereinafter called "Hinsch") was authorized to transport general commodities over regular routes between Boston, Massachusetts and New York, New York.

On November 27, 1951, St. Johnsbury filed an application under Section 5(2)(b) of the Interstate Commerce Act (herein called the Section 5 application) to acquire Hinsch's Certificate of Public Convenience and Necessity. The object of the application was to unify the operating authorities of St. Johnsbury and Hinsch so that through service could be performed by St. Johnsbury between Maine, New Hampshire and Vermont, on the one hand, and New York, points in New Jersey and points in Connecticut, on the other. In addition, approval of the application would authorize St. Johnsbury to institute service between Boston, Massachusetts, on the one hand, and New York points

in New Jersey, points in Rhode Island and points in Connecticut, on the other.[1]

The Section 5 application was heard by an Examiner of the Commission who recommended that the Commission approve so much of the application as would authorize St. Johnsbury to transport general commodities between points in the New York-New Jersey area, on the one hand, and points in Maine. In all other respects, the Examiner recommended a denial of the application.

On July 2, 1953, Division 4 of the Commission denied the Section 5 application in its entirety (59 M.C.C. 419). On January 19, 1954, the Commission, acting upon a petition for reconsideration filed by St. Johnsbury and Hinsch, reversed Division 4 and approved the application (59 M.C.C. 747). The appellant, M & M Transportation Company, thereafter filed a petition for reconsideration. Similar petitions were filed by other protestants and intervening carriers and, on March 15, 1954, the Commission entered an order denying the petition of M & M Transportation Company, but upon the petition of other intervenors, reopened the proceedings for reconsideration on the existing record. On April 5, 1954, the Commission modified its findings, but approved the application (60 M.C.C. 129).

Appellants brought this action in the United States District Court for the District of Massachusetts under Title 28 U.S.C. Sections 1336 and 2321-2325 to set aside the order of the Commission of January 19, 1954, as modified by the order of the Commission of April 5, 1954.

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[1] On December 18, 1951, Division 4 of the Commission, acting under the provisions of Section 210a(b) of the Interstate Commerce Act, authorized St. Johnsbury to temporarily operate under Hinsch's certificate. The temporary authority thus granted was extended, but in a proceeding in the United States District Court for the District of Massachusetts, the order granting the extension was enjoined. *Stone's Express, Inc.* v. *United States*, 122 F. Supp. 955. This injunction was stayed pending appeal by the Commission to the Supreme Court (No. 233; 363).

The District Court dismissed the complaint holding that the basic findings required by Section 5(2)(c) of the Interstate Commerce Act were made by the Commission and that the phrase "consistent with the public interest" does not require a finding by the Commission of a public need for the proposed service (Appendix "A", pp. 30, 32).

The District Court read the provisions of Section 5(2)(c) into, and as a substitute for, Section 5(2)(b). The latter prescribes the findings which must be made, namely, that the proposed transaction "is within the scope of subparagraph (a) and will be consistent with the public interest * * *." Section 5(2)(c) does not describe the basic findings as the District Court incorrectly assumes (Appendix "A", p. 27) but illustrates the considerations which the Commission must weigh in making the basic findings required by Section 5(2)(b).

Finally, the District Court held that one finding "appears to be without substantial support, but we have not the slightest reason to infer that without this finding the Commission's ultimate conclusion would have been any different" (Appendix "A", p. 33). The deficient finding is nowhere identified.

The concurring opinion reluctantly accepts the suggestion that the Commission's ultimate conclusion would have been the same even without the one finding and rejects the majority opinion that the term "consistent with the public interest" is a meaningless synonym for "not inconsistent" or a "neutral" term (Appendix "A", pp. 33, 34).

The Questions Are Substantial

The questions presented by this appeal involve matters of profound economic significance and grave legal consequence. Since 1935, when the Motor Carrier Act was adopted, there has been a progressive concentration of

motor carrier facilities through mergers and unifications. In less than twenty years, the trend towards monopoly and the emergence of large entreprenurial units have become the characteristic signs of the motor carrier industry. Thus, the Interstate Commerce Commission reported:

> "A large number of applications to purchase or acquire control of motor carriers by other motor carriers have been received during the year, a considerable proportion of which have received our approval. The trend towards larger units in the field of motor property operations which results from such unifications and other factors is indicated to some extent by the fact that, in 1940, class I carriers accounted for about 4 percent of all motor property carriers subject to our jurisdiction and, according to staff estimates, for 55 percent of the total operating revenues, whereas in 1953 they constituted 13 percent of the carriers and received 79 percent of the revenues. In 1950 the minimum revenue required for qualification as a class I carrier was raised from $100,000 to $200,000. While this change must be reckoned with, it may be noted that carriers having $1,000,000 or more of revenue were 22.6 percent of all class I intercity carriers in 1948 and accounted for 66.7 percent of that year's total revenue of class I carriers, while in 1952 their group of larger carriers represented 38.5 percent of the carriers and their revenue was 79.6 percent of the total. The concentration was greater for common carriers of general freight, as 46.5 percent of such carriers had $1,000,000 or more of revenue and their revenues were 85.7 percent of the group revenue." Interstate Commerce Commission Sixty-Eighth Annual Report (1954.)

An application under Section 5(2)(b) involves intensive and costly preparation and, frequently, protracted hearings and litigation. The urgent, if not imperative, need for a definitive construction of Section 5(2)(b) is reflected, in part, by the complaints of lawyer practitioners, that they

experienced difficulty in reconciling decisions by the Commission in Section 5 proceedings.[2]

Until guideposts are provided by the Supreme Court, a substantial number of decisions by the Commission will continue to be irreconcilable, rather than merely inconsistent, and the quasi-judicial process will degenerate into a series of *ad hoc* determinations.

A considerable number of cases challenging orders of the Commission in Section 5 proceedings reach various District Courts. Few of these cases are appealed to the Supreme Court. The miscellany of decisions fails to provide reliable precedents. A decision by the Supreme Court on the issue presented in this cause would serve to promote efficient judicial administration.

The decision by the Commission in the St. Johnsbury-Hinsch application proceedings is illustrative not only of an abandonment of its settled construction of Section 5(2)(b) and (c), but in conflict with the statute and the decisional precedents of this Court.

By its dismissal of the complaint, the District Court has embraced, though it rationalized, the errors committed by the Commission; it has misconstrued the statute, has disregarded its duty under the Administrative Procedure Act and has rejected standards for judicial review enunciated by the Supreme Court.

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[2] The Motor Carrier Lawyers' Association conducted a survey among its members to elicit views on the current trend of the Commission's decisions. 81% of those who responded replied that they had "difficulty in reconciling and distinguishing various factors of consideration by the Commission." 70% "felt that the Commission should make a clear declaration of its policies and principles * * *." One lawyer commented that Section 5 decisions are "terribly confusing, inconsistent and often times, incoherent and without justification." (Letter of the Law, Vol. II, No. 3 February 1955 pub. Motor Carrier Lawyers' Assn. p. 3-A.)

1. The Interstate Commerce Act, Part II (49 U. S. C. Section 301 et seq.) was designed to regulate the operations of interstate motor carriers by establishing, among other things, standards for the merger and unification of motor carriers.

Section 5(2)(b) of the Interstate Commerce Act permits the acquisition by one motor carrier of the operating property of another provided that the Commission finds that the proposed transaction will be consistent with the public interest.

Section 5(2)(c) describes certain of the considerations to be weighed by the Commission in "passing upon any proposed transaction under the provisions" of Section 5. The criteria expressly set forth are "among others" which must guide the Commission.

Clearly, the key statutory phrase is "consistent with the public interest". While the Supreme Court has reviewed decisions involving orders of the Interstate Commerce Commission approving applications under Section 5(2)(b), the question as to the requirement for proof and a finding of public need for a proposed unified service has never been resolved.

The District Court held, as the concurring opinion points up, that "consistent with the public interest" is either meaningless, or supererogatory or, at best, means "not inconsistent with the public interest" (Appendix "A", pp. 34, 35). In any event, the District Court rejected the Appellants' contention that the phrase requires a finding of public need (Appendix "A", p. 30). This construction of the phrase is refuted by the statute and has been rejected by the Commission in every case except in the St. Johnsbury-Hinsch application proceedings.

To begin with, in Section 5(2)(c), Congress prescribed aids to construction. If the phrase is meaningless, then its inclusion in Section 5(2)(b) was surplusage; Section

5(2)(c) alone would have sufficed. But the phrase is not meaningless. Section 5 is an integrated and, perhaps, the most precise, segment of the whole Interstate Commerce Act. To illustrate, in Section 5(2)(e), Congress employs the phrases "not inconsistent with the public interest" and "not * * * contrary to public interest." If Congress intended the negative gloss ascribed by the Court to "consistent with the public interest", the two entirely different phrases incorporated in Section 5(2)(e) must be products of legislative irresponsibility or a poverty of ideas. Since, however, Section 5 has been amended many times, the difference in language and context between Section 5(2)(b) and Section 5(2)(e) must be deemed deliberate and considered (24 Stat. 380; 37 Stat. 566; 41 Stat. 480; 48 Stat. 217; 48 Stat. 1080; 49 Stat. 543; 54 Stat. 905; 63 Stat. 485).

In short, the finding required by Section 5(2)(b) is that a proposed transaction will serve the needs of the shipping public, as distinguished from a handful of individual shippers, and the service will be congruent and consistent with the national transportation policy. This basic and ultimate finding must be supported by substantial evidence and in arriving at its decision, the Commission must give weight to the factors prescribed in Section 5(2)(c).

This is not a mere matter of substitution of the words "public need" for "consistent with the public interest." What is involved is the equation of the statutory phrase with the finding that the proposed service is required by the shipping public and the national transportation policy.

If the transportation needs of the shipping public were only a factor, it must be assumed that Congress would have included it in Section 5(2)(c). But is is not a factor; it is the Section 5(2)(b) end result of the processes of consideration as described in Section 5(2)(c).

The negative or neutral status assigned by the District Court to the basic finding "consistent with the public interest" vitiates the affirmative concept of "public interest."

(*New York Central Securities Corporation* v. *United States of America*, 287 U. S. 12, 25; *Texas* v. *United States*, 292 U. S. 522; *United States* v. *Lowden*, 308 U. S. 225.)

The Commission has, except in the *St. Johnsbury-Hinsch* case, consistently required as a condition of approval of a unification, affirmative proof that the proposed service will be responsive to the needs of the shipping public. Indeed, Commissioner Mahaffie, in his dissent (59 M.C.C. 747) said:

> "In granting this application without finding that there is public need for the service proposed to be rendered by vendee (it is true that the evidence wholly fails to support such a finding) the report departs from long established precedent in those cases where, as here, the operations to be acquired have been of little competitive significance."

The leading case decided by the Interstate Commerce Commission is *Pacific Intermountain Express Co.—Control and Purchase—Keeshin Freight Lines, Inc., etc.*, 57 M.C.C. 341, aff'd 57 M.C.C. 467. There, the Interstate Commerce Commission denied a Section 5 application for the following reason:

> "• • • Although there is some evidence that certain benefits would result from the transaction, there is none that the resulting service which would be provided would serve any public need, or that the requirements of the shipping public are not now being adequately met by existing carriers. We are required by the national transportation policy 'to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers'; and paragraph 2(c) of section 5 specifically provides that we must give weight to the 'effect of a proposed transaction upon adequate transportation service to the public.' The words 'public interest' as used in section 5 clearly comprehend the interest of competing carriers. Their interest is no different than that of the general public in preventing the wasteful transportation which results from surplus transportation. Texas v. United States, 292 U. S. 522". (p. 380).

The District Court concludes that the principle of this case was modified by the Commission and its ambit limited. But in *Ringsby Truck Lines, Inc.—Control—Northern Transportation Company,* 58 M.C.C. 594, upon which the District Court relies, the Commission held that the record "affirmatively establishes that the proposed plan of operations would meet a public need * * *" (p. 598).

Precisely this principle has been affirmed in literally scores of decisions by the Commission in Section 5 cases. Moreover, in its construction of the phrase "consistent with the public interest", as it appears in Section 209(b) of the Interstate Commerce Act (49 U.S.C. 309(b)), the Commission abandoned its early construction of the phrase as the equivalent of "not hostile to the public interest" and thereafter approved or denied applications for contract carrier permits depending upon the absence or presence of proof of public need for the service. *William Heim Cartage Company Incorporated—Extension of Operations—Indianapolis,* 20 M.C.C. 329; *E. H. Shoemaker Contract Carrier Application,* 53 M.C.C. 246; *Cumberland Automobile and Truck Company, Inc.—Extension—19 States,* 52 M.C.C. 772; *Jack Hudson, Inc., Contract Carrier Application,* 54 M.C.C. 681; *Clyde R. Sauers, Extension—East Cambridge, Mass.,* 61 M.C.C. 65.

Similarily, in its construction of the phrase "consistent with the public interest" in Section 410(c) of the Interstate Commerce Act (49 U.S.C. 1010(c), the Commission has required proof of public need. *General Carloading Co. Inc. Freight Forwarder Application,* 260 I.C.C. 345; *Carloader Corporation, Freight Forwarder Application,* 260 I.C.C. 401.

It is fundamental that the construction given by an agency to the act it administers is entitled to persuasive weight. *United States* v. *The Alabama Great Southern Railroad Company,* 142 U. S. 615; *United States* v. *American Trucking Associations, Inc.,* 310 U. S. 534.

2. Even if it is to be assumed that the Commission is not required, under Section 5(2)(b), to make the basic finding that a propo ed transaction will be responsive to the transportation needs of the shipping public and if it be assumed that a finding that a proposed service will be consistent with the public interest is sufficient if a mere statement of the statutory language is made, the order in the *St. Johnsbury-Hinsch* case is nevertheless invalid.

Traditionally, the Commission will consider, among the factors described in Section 5(2)(c), the adverse effect of the proposed transaction on competing carriers and "reasonableness of the terms, manner of payment of the total consideration, the effect on the purchaser's financial, stability, the effect on adequate and economical transportation in the territory, and other matters affecting the public interest." *Raymond Bros. M. Transp., Inc.—Purchase—North American,* 37 M.C.C. 431.

In the *St. Johnsbury-Hinsch* case, the Commission said:

> "• • • the record discloses that most of the opposing carriers have enjoyed increased operating revenues and net income for the years 1948 to 1951, when vendee was not a competitor, and that there is no evidence of record warranting the belief that they would be materially harmed by the proposed unification" (59 M.C.C. 747, 758).

Clearly, a finding that opposing carriers enjoyed some prosperity before St. Johnsbury instituted the proposed service is not the equivalent of a finding that there will be no adverse effect on competing carriers. The impact of adverse effect will be felt in the future. Nowhere does the Commission say that there will be no such future adverse effect. Indeed, there is no such evidence to support such a finding. Moreover, the Commission apparently imposes upon the protestants, a burden which St. Johnsbury and Hinsch must assume. The burden was upon them to prove that there would be no adverse effect upon the protestants

and an affirmative finding to that effect was required. Thus, in the *Pacific Intermountain Express Company* case, the Commission, upon reconsideration (57 M.C.C. 467), said:

> "We think that under that section it has been and is our duty to consider the effect which a proposed new unified service will have on the continuance, efficiency and economy of existing carrier services, and, if such proposed new unified service would adversely affect to any substantial extent the continuance, efficiency, and economy of existing carrier services, to the detriment of the public, whether it would result in offsetting advantages to the public and whether approval or disapproval would more nearly conform with the policy of Congress declared in the national transportation policy" (p. 470).

Assuming, *arguendo,* that the transportation needs of the shipping public is only a factor to be weighed under Section 5(2)(c) rather than the basic and ultimate finding required under Section 5(2)(b) a reading of the Commission's opinion in the *St. Johnsbury-Hinsch* case discloses, at once, that this factor was not weighed and no finding, as to public need was made. Thus, the Commission says:

> "The evidence of the representatives of shippers with manufacturing and processing plants at 10 points in Maine, 2 in Vermont and 2 in northern New Jersey, as set forth in detail in the prior report, was generally to the effect that they would continue to utilize the through single-line service of vendee if the transaction were approved and consummated" (58 M.C.C. 747, 757).

A finding that shippers will continue to patronize a given carrier has never been regarded by the Commission as sufficient proof of public need or the equivalent thereof. The preferences of individual shippers (even for an inefficient and unnecessary service) is not tantamount to a statement that the transportation needs of the shipping public, generally, require the proposed service.

In short, at least two basic factors were not weighed and no adequate findings were made with respect thereto. Merely restating the language of the statute and employing the caveat that the service will be consistent with the public interest and "be to the advantage of the shipping public" does not satisfy the statutory requirement for basic and ultimate findings.

Accordingly, if the District Court's construction of the statute is accepted, the Commission's order in the *St. Johnsbury-Hinsch* case must fail because it does not meet the criteria upon which the District Court relied.

3. The appellants do not suggest that consistency is a prerequisite for a valid order. *Georgia Public Service Commission* v. *United States,* 283 U. S. 765; *Virginian Railway Company* v. *United States,* 272 U. S. 658; *Securities & Exchange Commission* v. *Chenery Corp.,* 332 U. S. 194. But a departure from a long established principle must be justified or explained. No such explanation was given by the Commission in the *St. Johnsbury-Hinsch* case.

The District Court misread the decision of this Court in *Secretary of Agriculture of the United States* v. *United States,* 347 U. S. 645. In that case, this Court acknowledged that the Commission did set forth its reasons and findings but it was instructed to make its reasons for departure from prior norms "more explicit" (page 655).

The discretion of the Commission is not unlimited and it cannot adopt principles on an *ad hoc* basis. Frankfurter, The Task of Administrative Law, 75 U. of Pa. L. Rev. 614; *United States* v. *Carolina Freight Carriers Corp.,* 315 U. S. 478; *Howard Hall Company Inc.,* v. *United States,* 315 U. S. 495. *E. Brooke Matlack, Inc.* v. *United States,* 119 F. Supp. 617 (E.D. Pa.).

The District Court makes reference to so-called "extensive findings" by the Commission (Appendix "A", p. 28) but the findings to which the District Court alludes are

these: St. Johnsbury would find a direct line service more convenient for St. Johnsbury insofar as part load shipments are concerned (interchange of full truckload shipments having proved satisfactory); that a balanced operation would inure to the benefit of St. Johnsbury and that some shippers have requested an overnight through service between New England and the New York metropolitan area. But nowhere in the decision by the Commission nor in the opinion of the District Court is there an iota of evidence that the proposed service is responsive to the needs of the shipping public and that these needs are not being met by existing carriers, that the interests of the shipping public would be promoted and advanced by the unification; that additional equipment would be made available to the public and that adequate and efficient service of the kind proposed by the application is not presently available to the public. Concededly, the Commission need not find that existing facilities are inadequate. But it must find that the shipping public requires the proposed service and that the service will serve a useful public function.

In *McLean Trucking Company, Inc. etc.* v. *United States of America, etc.*, 321 U. S. 67, the basic issue involved was the weight to be accorded to the anti-trust policy and competition in a Section 5 proceeding. But it is significant that the Commission found affirmatively that the proposed transaction would provide a more adequate transportation service to the public (38 M.C.C. 137). Thus, the Commission, in the *McLean* case, pointed out that there was an inadequacy of truck facilities, that trucks were being used with insufficient load factors and that the proposed consolidation would serve to increase the availability of trucks, reduce the empty load factor and thereby provide the public with additional facilities. Specifically, the Commission found: "Many carriers are now finding it difficult to provide adequate equipment to meet the needs of the shipping public" (38 M.C.C. 137, 143).

These findings were never challenged in the Supreme Court. Indeed, they were supported by substantial evidence. In the *St. Johnsbury-Hinsch* case, the Commission did not and could not find an existing insufficiency of service or a public need for the service proposed by the application. Nevertheless, without finding public need, the Commission approved the application and substituted a mere statement of the factors described in Section 5(2)(c) for the basic finding of public need. And it may be noted that such findings as were made by the Commission were not supported by substantial evidence. The Examiner and Division 4 found, as the record disclosed, that the shippers involved handled limited commodities and that they acknowledged, on both direct and cross-examination, sufficient service by existing carriers; existing carriers were providing all of the service required by the shipping public and because of the serious competitive situation in the New England area, the proposed unified service would create an adverse competitive effect (59 M.C.C. 419 at p. 445). In this connection, it is singular that when the Commission failed to consider the adverse effect on existing carriers, it not only disregarded the evidence in the record, but the results of an investigation that was conducted at approximately the time when the *St. Johnsbury-Hinsch* case was before it.

In *Motor Carrier Rate, New York City area-New England,* MC-C-1115 (decided July 13, 1954, 10 F.C.C. (CCH Motor Carrier Reports. Paragraph 33,082), the Commission specifically found that more than 50% of the carriers in the New England area had operating ratios in excess of 100 and that financial distress characteristic of these carriers had increased over the prior year.

Accordingly, the Commission disregarded the record and while it repeated many of the facts independently found by the Examiner and Division 4, it capriciously concluded that the transaction was consistent with the public interest. A mere restatement of the language of the statute, without the

supported basic finding of public need for the proposed service is plainly insufficient. *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U. S. 515, 533; *Phelps Dodge Corporation* v. *National Labor Relations Board*, 313 U. S. 177; *Florida* v. *United States*, 282 U. S. 194; *Atchison, Topeka & Santa Fe Railway Company* v. *United States*, 295 U. S. 193; *Colorado-Wyoming Gas Company* v. *Federal Power Commission*, 324 U. S. 626. The order should have been vacated by the District Court.

4. The District Court concluded that "one finding appears to be without substantial support." To begin with, the Court fails to identify the deficient finding. While, concededly, the absence of substantial evidence to support an immaterial finding will not invalidate an order or require that it be remanded, it is impossible to determine, from the opinion of the District Court, whether the omitted finding is, in fact, immaterial. Clearly, if the Commission's order was not sustained by any fact upon which it was predicated, it should have been remanded for further proceedings so that additional findings of fact could be made or, alternatively, that the Commission reverse its earlier decision. To remand the case to the Commission would not amount to "marching the king's men up the hill and then marching them down again" (Appendix "A", p. 33), but marching the men over the hill.

This court has not hesitated to remand a case to an agency for a necessary finding. *Securities Exchange Commission* v. *Chenery Corporation*, 318 U. S. 80.

The District Court attributes to the Interstate Commerce Commission a prescience which, prior to the Administrative Procedure Act, insured almost automatic enforcement of an agency order. But the enactment of the Administrative Procedure Act imposes a new responsibility upon a reviewing court. *Universal Camera Corporation* v. *National Labor Relations Board*, 340 U. S. 474; *Pittsburgh S.S. Co.*

v. *National Labor Relations Board*, 180 F. (2d) 731, aff'd 340 U. S. 498.

In determining whether or not an order is supported by substantial evidence, it is the function of the Court to "take into account whatever in the record fairly detracts from its weight." *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474, 487-488.

Under the Administrative Procedure Act, the reviewing court has the duty to make clear and explicit findings and the standards of clarity established for administrative decisions must now be applied to the reviewing courts. In short, the Supreme Court "must know what a decision means" before it can say that the District Court was "right or wrong." *United States* v. *Chicago Milwaukee St. Paul & Pacific Railroad Company*, 294 U. S. 499.

In one other particular the District Court has disregarded the lesson of *Universal Camera Corporation* v. *National Labor Relations Board*, 340 U. S. 474. Nowhere has the reviewing court given weight to the findings of the Examiner and Division 4. The decision of the Commission reveals that no consideration was given to the Examiner's report and no explanation tendered as to why and how it arrived at a conclusion directly contrary to the one recommended by the Examiner and approved by Division 4.

5. In the course of the proceedings in the District Court, the appellants requested an admission that the Commissioners did not read, review and consider the whole record. While the answer to the complaint admitted that the members of the Commission did not read the entire record, it denied that the whole record was not reviewed and considered by the members of the Commission. If, indeed, the Administrative Procedure Act was calculated to broaden judicial review, then this objective can never be achieved unless there is an efficient way of determining whether the whole record was reviewed by the administrative agency. Concededly, this may place an onerous duty upon the agency

and its members, but the burden, if any, must be removed by the Congress and not the courts.

The request for admissions was not designed to probe the Commission's mental processes. The appellants did not ask whether the Commissioners read each page of the record or thumbed them through. The appellants merely inquired whether the record was before each of the Commissioners. Plainly, if the Commissioners admitted that the record was not before them at any time, it must be implied that they did not review and consider it. Conversely, if the record was before each Commissioner or the Commissioners had access to the record the doctrine of the *Fourth Morgan* (*United States* v. *Morgan*, 313 U. S. 409) case might foreclose inquiry as to the extent of consideration to the record given by each Commissioner. But the mere statement by the Commission that its decision is based on the whole record is not binding. *United States of America ex rel., May Johnson* v. *Shaughnessy*, 336 U. S. 806.

Clearly, if the transcript and the exhibits were burned in the docket room before they were requisitioned by the Commission and the Commission then issued an order, that order could not be sustained as one based on the whole record. It seems plain that one should be permitted to inquire whether the record was before the agency before the order was issued. *Weekes* v. *O'Connell*, 304 N. Y. 259. Appellants do not seek a reversal of the doctrine enunciated by this Court in *United States* v. *Morgan*, 313 U. S. 409. In that case, this Court held only that one may not inquire as to the extent to which an administrative officer considered the record or what mental conclusions he arrived at, but it did not say that a litigant was foreclosed from inquiring whether the administrative officer did, in fact, consider the record.

All that the appellants seek by the requests is to determine whether the Commissioners had the record and the opportunity to "dip" into the record and not how far or how deep

the "dip" was. This limited inquiry cannot be equated with a probing of mental processes.

It is no answer to the Appellants' demand for an admission that an agency may employ or rely upon subordinates. The Administrative Procedure Act was designed to correct the abuse of reliance by agency members solely upon a summary or analysis prepared by an anonymous assistant. The availability of the record is a minimum requirement for the proper discharge by an agency of its quasi-judicial function. Administrative Procedure Act, Legislative History, Senate Document No. 248, page 272, page 86; *Universal Camera Corporation* v. *National Labor Relations Board*, 340 U. S. 474.

As one authority has said:

> "The framing of the opinion can be left to outside hand. But the man who decides the language has to have a sense of the record. He may not have to pore over the record as a whole, but he has to know what is in the record, what the issue is and to reach his own conclusion with reference to it."
>
> Landis, Symposium on American Administrative Law, 9 Am. L. School Rev. 181, 182;
>
> See, too, Landis, The Adminisrative Process, pp. 105-106.

CONCLUSION

It is respectfully submitted that the decision of the District Court fails to recognize that the Commission may not approve a Section 5(2)(b) application unless there is a finding of public need for the proposed unified service and the order is otherwise bottomed upon basic findings supported by substantial evidence; that an order of the Commission cannot be sustained if one material finding is not supported by substantial evidence; that the decisions of this Court do not foreclose one who challenges an order of an

administrative agency from inquiring whether or not t
agency reviewed or considered the record.

Appellants believe that the questions presented by th
appeal are substantial and of importance not only to t
public generally, but to the Interstate Commerce Comm
sion and those who are regulated by, and practice befo
that agency.

Respectfully submitted,

HERBERT BURSTEIN,
Attorney for M & M TRANSPORTATI
COMPANY and STONE'S EXPRESS, IN
Appellan

July 22, 1955.

APPENDIX A

DISTRICT COURT OF THE UNITED STATES,

DISTRICT OF MASSACHUSETTS.

CIVIL ACTION No. 54-353-M.

M. & M. TRANSPORTATION COMPANY AND STONE'S EXPRESS, INC.,

Plaintiffs,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Defendants.

Before:

MAGRUDER, *Circuit Judge,* and MCCARTHY and ALDRICH, *District Judges.*

HERBERT BURSTEIN, for Plaintiffs.

JAMES E. KILDAY, JOHN H. D. WIGGER, STANLEY N. BARNES, Assistant Attorney General.

ANTHONY JULIAN, United States Attorney, for the United States of America.

EDWARD M. REIDY, Chief Counsel, for the Interstate Commerce Commission.

OPINION OF THE COURT

January 14, 1955

MAGRUDER, *Circuit Judge.* This action was brought by two motor common carriers pursuant to 28 U. S. C. §§ 1336, 2321-2325 to set aside and enjoin enforcement of orders of the Interstate Commerce Commission authorizing the acquisition by St. Johnsbury Trucking Company, Inc., of St. Johnsbury, Vermont, of a portion of the operating rights of Hinsch Transportation Co., Inc., of New York, N. Y., and further authorizing acquisition of control of these operating rights by certain individuals, shareholders of St. Johnsbury.[1] The effective date of the Commission's orders authorizing the acquisition has been extended to 30 days after final judgment in the instant proceeding.

Briefly, prior to the acquisition St. Johnsbury was authorized by certifiate No. MC-108473 to transport general commodities, with certain exceptions, over regular routes between Boston and Springfield, Mass., and a variety of points in Massachusetts, Vermont, New Hampshire, and Maine, and over irregular routes between points in Vermont and points in Rhode Island, Massachusetts, Connecticut, and New York. Under its certificate, No. MC-55888 Hinsch was authorized to operate as a motor common carrier of general commodities, with certain exceptions, over regular routes between the New York metropolitan area and Boston and Springfield, Mass., serving a variety of intermediate points.

On November 27, 1951, St. Johnsbury and Hinsch jointly applied for the Commission's approval of the acquisition of most of Hinsch's rights by St. Johnsbury for $75,000.

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[1] Harry D. Zabarsky et al.—Control; St. Johnsbury Trucking Company, Inc.—Purchase—Hinsch Transportation Co., Inc., 60 M.C.C. 129 (1954) modifying 59 M.C.C. 747 (1954), rev'g 59 M.C.C. 419 (1953).

The statutory provisions relevant to this acquisition are §§ 5(2)(a), (b), (c), and (e) of the Interstate Commerce Act, 49 U. S. C. §§ 5(2)(a), (b), (c), and (e).

On December 18, 1951, the Commission granted St. Johnsbury temporary authority under 49 U. S. C. § 310a(b) to operate under the Hinsch rights for a period of 180 days. This temporary authority was later extended, and in a proceeding before this court the extension was held to have been without authority and was enjoined. *Stone's Express, Inc.* v. *United States,* 122 F. Supp. 955 (1954). This injunction has been stayed pending appeal by the Commission to the Supreme Court. St. Johnsbury is presently serving Hinsch points under this temporary authority and did so during the period when its application for permanent acquisition was being processed before the Commission.

An extended hearing on the application for permanent acquisition was held before a trial examiner at which many competing carriers throughout the New York to Maine area appeared to protest the proposed acquisition. The examiner recommended that approval not be given to acquisition of the major portion of the Hinsch rights, under which he found Hinsch had conducted almost no operations and which, if granted, would permit St. Johnsbury to perform a new and entirely different service in a territory now adequately served by existing carriers. The examiner recommended approval of acquisition of Hinsch rights between the New York metropolitan area and points in Maine, via Boston. As to this service, the examiner found that it would serve the needs of shippers, that it had not been sufficiently established by the protestants that St. Johnsbury's entry into this area would substantially impair the financial position of existing carriers, and that Hinsch had interchanged some shipments with other carriers for delivery to points in Maine.

Upon review by Division 4 of the Commission, at which both the applicant and the protestant carriers filed excep-

tions to the examiner's proposed report, it was held that the acquisition of any of the Hinsch rights by St. Johnsbury would not be consistent with the public interest and therefore should be denied. The Division accepted the examiner's conclusions as to the major portion of the rights, but found that, as to the limited New York to Maine authority, the evidence of shipper convenience did not establish a need for such service, the service would bear little resemblance to that which Hinsch formerly rendered alone or by interchange, the purchase price would have little justification based on Hinsch's past operations, it did not appear that the limited operation would be economically practicable, and entry of St. Johnsbury might jeopardize existing carriers, many of which already suffered high operating ratios (i.e., ratios of current expense to current income).

Upon reconsideration by the full Commission, the decision by Division 4 was reversed and the acquisition found to be authorized by the Act. Certain relatively minor exclusions were made in the rights to be acquired. By a later order, the Commission excluded operations by St. Johnsbury between northern New York and certain intermediate Hinsch points in Connecticut and Rhode Island, finding that Hinsch had rendered little or no service to these points.

Petitioners have in their complaint assailed the order of the Commission on a number of grounds, but principally petitioners argue that the Commission's "basic" findings underlying the "ultimate" statutory findings are inadequate to support the ultimate findings and that such basic findings as the Commission did make are not supported by substantial evidence on the whole record.

The courts have continually asserted that the discretion of the Commission in a § 5 proceeding is sweeping, Congress intending that the Commission exercise its expert knowledge in assuring consistency with the public interest, and the exercise of this discretion will not be disturbed if the Commission's findings are adequate in vew of the statutory re-

quirements. See, *e.g., McLean Trucking Co.* v. *United States,* 321 U. S. 67, 86-88 (1944); *Herrin Transp. Co.* v. *United States,* 108 F. Supp. 89, 93-95 (E. D. La. 1952), aff'd Per Curiam 344 U. S. 925 (1953); cf. *United States* v. *Pierce Auto Freight Lines, Inc.,* 327 U. S. 515, 530-33, 535-36 (1946). But it is not enough that the Commission find, as it did find, the ultimate facts required by § 5 (i.e., that "the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest," that the terms and conditions of acquisition are "just and reasonable," [2] and that the transaction will not "result in an increase of total fixed changes, except upon a specific finding by the Commission that such increase would not be contrary to public interest"). On review, an order should be set aside if it does not contain the "basic" or "essential" or "quasi-jurisdictional" findings necessary to support its conclusions. *E.g., Florida* v. *United States,* 282 U. S. 194, 208-09, 212-15 (1931); *United States* v. *Chicago, M., St. P. & Pac. R. R. Co.,* 294 U. S. 499, 504-05, 510-11 (1935); *United States* v. *Pierce Auto Freight Lines, Inc., supra* at 533; *Secretary of Agriculture* v. *United States,* 347 U. S. 645, 652-54 (1954). Compare *Beaumont, S. L. & W. Ry Co.* v. *United States,* 282 U. S. 74, 86-87 (1930). See our reference to this matter in *New York Central R. R. Co.* v. *United States.* 99 F. Supp. 394, 400-01 (1951).

The nature of the required basic-findings is in part stated, in part suggested, by the statute. Section 5(2)(c) prescribes that the Commission should give weight to, among other considerations, "(1) The effect of the proposed transaction upon adequate transportation service to the public; * * * (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the car-

[2] The precise statutory language is, "If the Commission finds that subject to such terms and conditions and such modifications as it shall find to be just and reasonable * * * it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable * * *."

rier employees affected." And by requiring ultimate findings of "public advantage" or "public convenience and necessity" to support similar transactions, Congress by implication has indicated that these findings need not be made in an acquisition proceeding involving only motor carriers.[3] The Supreme Court has several times mentioned other factors which should be reflected in the Commission's basic findings in a § 5 proceeding. *New York Central Securities Corp.* v. *United States*, 287 U. S. 12, 23, 25 (1932) ("economy and efficiency in operation"; "adequacy of transportation service"); *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 86-88 (1944) (improving adequacy of service, but Commission need not find that existing service is inadequate; Commission should consider diminution of competition).

Here the Commission made extensive findings which clearly meet the requirements established under the statute. With regard to the promotion of efficient operations by the acquisition, it found that although St. Johnsbury's interchange with other carriers of full truckloads had, with some delays, been generally satisfactory, interchange of less than truckloads had not been satisfactory and attempts made by St. Johnsbury to remedy this situation had not succeeded; that Hinsch's preponderance of northbound traffic and St. Johnsbury's preponderance of southbound traffic, if unified, were expected to afford a balanced operation and provide a unified service, operating more efficiently, eliminating facility duplication, without materially

[3] Section 5(2)(b) provides that if a railroad is an applicant for acquisition of a motor carrier, the Commission must find not only consistency with the public interest but also that the acquisition will enable the railroad "to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition." Where application is made for a new motor carrier certificate, the Commission must find the applicant "fit, willing, and able" and that the proposed service "is or will be required by the present or future public convenience and necessity * * *." Section 207, 49 U.S.C. § 307.

increasing operating costs; that St. Johnsbury's earnings were greater on shipments between Vermont and the New York metropolitan area via Springfield or Albany, which would be permitted under the Hinsch license, than via Boston, its only gateway for present regular service; and that St. Johnsbury was financially more sound and a more efficient operator than Hinsch. As to the scope of the Hinsch operations, the Commission found that Hinsch operated primarily between New York City and Boston but participated in shipments to and from points in Massachusetts, Connecticut, Rhode Island, and the New York metropolitan area; that Hinsch operated on a scale commensurate with its resources and facilities; and that Hinsch interchanged some shipments both at New York City and Boston and at intermediate points. With regard to the desires of shippers in the area in question, the Commission found that, if the acquisition were approved, St. Johnsbury would institute overnight through service between New England and the New York metropolitan area in response to the requests of shippers; and that shippers' testimony was generally that they would continue to utilize St. Johnsbury's through single-line service if the acquisition were approved. With regard to the reasonableness of the purchase price for the Hinsch rights, the Commission found that Hinsch had continually conducted some operations within its authority, from which it derived annual gross operating revenues in excess of $200,000; that this amount of traffic was of some going-concern value; that had the operations been unified in 1951 St. Johnsbury's net income for that year would have increased an amount estimated to be approximately 10 percent of the purchase price; and that the purchase price did not appear to be excessive, and payment should not prove improvident or unduly burdensome. With regard to the effect of the acquisition upon competing carriers, the Commission found that the probability that St. Johnsbury, as a more aggressive carrier, would become a more substantial competitor by providing single-line service in lieu of interline service, did not necessarily preclude ap-

proval; that most of the protestant carriers had increased operating revenues and net income since 1948, and it did not appear that they had lost or would lose sufficient traffic to affect their operations materially; and that the available traffic was ample to support continuation of a part of Hinsch's operations, as unified with St. Johnsbury, as well as the operations of competing carriers.

Petitioners contend the findings are inadequate essentially because there is no finding (1) that a public need existed for the unified service, (2) that the existing service was inadequate, and (3) that a new service was not created by the acquisition. They claim that prior Commission decisions which they maintain require these findings (1) are entitled to weight in interpreting the ambiguous ultimate requirement of consistency with the public interest and (2) must be adhered to by the Commission or specifically announced as abandoned. Those contentions are without merit for several reasons: First, the Commission findings, although not made in the precise language urged, largely meet the petitioners' objections. Second, it is not entirely manifest that the Commission in the instant case departed from carefully enunciated prior principles. Petitioners rely to a great extent on *Pacific Intermountain Express Co.—Control and Purchase—Keeshin Freight Lines, Inc.*, 57 M.C.C. 541 (1950). There the proposed acquisition was opposed not only by competing motor carriers but by the transcontinental railroad systems and certain grain interests. The Commission found that aggressive competition by the applicant on a trans-continental basis might seriously impair the economic operation of the railroads and result in higher rates, not only with respect to carriage of commodities which the motor carriers might solicit, but also as to commodities which must necessarily be transported by rail. It is true that the order also stated as additional reasons for denial that motor competitors might suffer adversely, that since the applicant had inter-changed little traffic acquisition would result in a new service, and that the

resulting service would serve no proved public need. There is also a statement to the effect that the standards adopted in an application for new operating authority under § 207 should be applied in a § 5 proceeding to require denial of a proposed acquisition where no public need is shown, a new service would result, and existing carriers seem able to perform adequate service. However, on rehearing (57 M.C.C. 467 (1951)) some of this language was withdrawn, and in its report on reconsideration in *J. W. Ringsby —Control; Ringsby Truck Lines, Inc.—Control—Northern Transportation Co.*, 58 M.C.C. 594 (1952), the Commission further limited the application of the *Pacific Intermountain Express* decision. Third, even if the latter case had not been limited by later decisions, the asserted inconsistency between the instant result and that in the *Pacific Intermountain Express* case would not require setting aside the Commission order. The courts have many times held that the findings of the Commission may not be attacked because they are inconsistent with findings made in other cases. *E. g., Georgia Public Service Commission* v. *United States*, 283 U. S. 765, 775 (1931); *Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 663 (1926); *Western Paper Makers' Chemical Co.* v. *United States*, 271 U. S. 268, 271 (1926). Cf. *Federal Communications Commission* v. *WOKO, Inc.*, 329 U. S. 223, 228 (1946). Petitioners cite *Secretary of Agriculture* v. *United States*, 347 U. S. 645 (1954), for the proposition that the Commission must explain a departure from prior decisional principles. In this case an order was vacated primarily because of the inadequacy of the Commission's findings to explain the legal basis of its decision. The Court was unable to tell from the order what the Commission meant, and when the Court looked at prior decisions of the Commission it found them inconsistent with the result reached. While the Court did say (at p. 653) that "the Commission has not adequately explained its departure from prior norms," this became important only because the findings given were inadequate. Thus it would appear that, had the basic findings of the order been

adequate, the Court would not have reached the question whether the Commission had without explanation departed from prior decisional norms. See *Barrett Line, Inc.* v. *United States,* 326 U. S. 179, 201-02 (1945). In the same way this court, in *New York Central R. R. Co.* v. *United States,* 99 F. Supp. 394 (1951) looked to prior Commission decisions not to require an explanation of inconsistency but in an attempt to understand the basis of the decision where the findings were either unclear or not made. Where, as in the instant case, the findings are on their face adequate and explain the basis for decision, there is no occasion to examine consistency with prior decisions. Fourth, while the inconsistency of prior Commission decisions might stimulate judicial examination of the Commission's interpretation of a statute, see *Barrett Line, Inc.* v. *United States, supra,* at 190-93, 196-98, it is not possible here to hold that the statute's "consistent with the public interest" requires the basic findings urged by petitioners.[4]

A reviewing court's inquiry as to the evidentiary support for Commission findings is limited to determining whether there is substantial evidence for the findings on the whole record or such portions as may be cited by a party. (5 U. S. C. § 1009 (e) (§ 10 (e) of the Administrative Procedure Act).) We assume, without deciding, that this is a case "reviewed on the record of an agency hearing provided by statute." See *Herrin Transp. Co.* v. *United States,* 108 F.

[4] The distinction between § 5s "consistent with the public interest" and § 207's "public convenience and necessity" disposes of the contention as to a finding of public need. And even within § 5, it is evident that Congress intended a distinction between "public interest" and "public advantage." Petitioners' argument that the Commission must find the existing service inadequate in a § 5 proceeding has been rejected by the Supreme Court. *McLean Trucking Co.* v. *United States,* 321 U. S. 67, 86-87 (1944). Lastly, it would not seem that the creation of a new service would be inconsistent with the public interest—on the contrary, it might greatly benefit the public. If petitioners' argument were to prevail, acquisitions would be limited to those involving non-contiguous carriers, or carriers which substantially interchanged all through traffic with one another.

Supp. 89, 94 (E. D. La. 1952), aff'd Per Curiam 344 U. S. 925 (1953). Petitioners attack substantially all the Commission findings on this ground. Although the record contains some conflicting evidence, all the important basic findings made by the Commission are supported by substantial evidence on the whole record. One finding appears to be without substantial support, but we have not the slightest reason to infer that without this finding the Commission's ultimate conclusion would have been any different. Even without this one questionable finding we would uphold the order of the Commission. It would be judicial administration amounting to nothing more than "marching the king's men up the hill and then marching them down again." [5] to set aside the order of the Commission for this reason. See *Bethlehem Shipbuilding Corp. Ltd.* v. *National Labor Relations Board*, 114 F. 2d 930, 935 (C. A. 1st, 1940), quoting *N. L. R. B.* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241, 247 (1939).

A judgment will be entered dismissing the complaint.

ALDRICH, District Judge, concurs in the result. ALDRICH, *D. J.*, Concurring:

I am willing to concur, albeit reluctantly, that the complaint should be dismissed. This hesitation is due to the fact that I find it a little difficult to assume as readily as does the majority that there is "not the slightest reason to infer that without one finding," which the court finds to be without substantial support, the Commission's ultimate conclusion would have been any different. Basically the Commission made few findings of the sort required to support its order. The finding which I understand the majority concedes to be unwarranted in the relatively brief supportative part of the Commission's opinion appears twice. It is with reluctance that I conclude that without it the ultimate decision would have been the same. Indeed, were it not for the heavy burden on the plaintiffs I would reach the opposite result.

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[5] *City of Yonkers* v. *United States*, 320 U. S. 685, 694 (1944).

What troubles me more seriously are certain observations in the majority opinion dealing with the meaning and interpretation of § 5's "consistent with the public interest."

The Transportation Act of 1920 was a relatively simple affair. The act has grown into its present comprehensive and complex condition sporadically. The almost inevitable result is that an entirely uniform meaning and purpose, if it still exists, is hard to discover. This seems particularly so with respect to the elusive phrase "consistent with the public interest."

As I read its opinion, the majority is at least receptive to the idea that "consistent with the public interest" as used in § 5 is to be equated with the phrase "not inconsistent with the public interest"—in other words, that it is a mere neutral status. While this is not an impossible result, both the history of the act and such principles of uniformity of construction as it now permits lead me to the opposite conclusion.

Before the Commission under the Transportation Act of 1920 could approve joint ownership or control there had to be a finding that it "will be in the public interest," or that the "public interest will be promoted." Ch. 91, § 407, 41 Stat. 481. In the subsequent amplification and reenactment of these provisions these phrases were displaced with "will be consistent with the public interest," "to public advantage," "would not be contrary to public interest." 49 U. S. C. A. § 5 (2) (b) and (c). The extent that this introduced new meanings is the question. Although the wording was changed, I believe that fundamentally the same result was intended. Not that "consistent with the public interest" means "public convenience and necessity," or even, as contended by plaintiffs here, "public need," but that it at least means something positive. In other words, I think "consistent with" means "*in* the public interest," and something more than the mere negative "not inconsistent." The phrase used once, "public advantage," which the majority

distinguishes, I believe is a grammatical, and not a semantic difference.

No purpose will be served by my laboring this matter, except to note that all that is required for the Commission to approve a complete merger under § 5 (2) is that it be consistent with the public interest, whereas mere joint agreements under § 5 (1) require a showing of better service to the public, or of economy in operation, and that they will not unduly restrain competition. Consequently a neutral interpretation of § 5 (2) would seem to make a complete merger more easily endorsable than a joint agreement. I would not care to uphold decisions under § 5 (2) that have only neutral findings to support them.

FILED
AUG 2 0 1955
HAROLD B. WILLEY, C

No. 265

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

M & M TRANSPORTATION COMPANY AND STONE'S EXPRESS, INC., *Appellants,*

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

Appeal from the United States District Court for the District of Massachusetts

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MOTION TO AFFIRM ON BEHALF OF ST. JOHNSBURY TRUCKING COMPANY, INC., AND HINSCH TRANSPORTATION CO., INC., INTERVENERS

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Attorney for
St. Johnsbury Trucking Company, Inc., and Hinsch Transportation Co. Inc., Interveners.
726-734 Investment Building,
Washington 5, D. C.

August 20th, 1955.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 265

M & M TRANSPORTATION COMPANY AND STONE'S EXPRESS, INC., *Appellants,*

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

Appeal from the United States District Court for the District of Massachusetts

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MOTION TO AFFIRM ON BEHALF OF ST. JOHNSBURY TRUCKING COMPANY, INC., AND HINSCH TRANSPORTATION CO., INC., INTERVENERS

Appellees, St. Johnsbury Trucking Company, Inc., and Hinsch Transportation Co., Inc., pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the final judgment of the District Court in this action be affirmed, because

the questions presented by this appeal "are so unsubstantial as not to need further argument". (Rule 16, 1(c)).

This is a direct appeal from the final judgment, entered on January 14, 1955, by a specially-constituted District Court of three judges convened pursuant to Section 2284, Title 28, United States Code, dismissing appellants' complaint seeking to set aside an order of the Interstate Commerce Commission, hereinafter referred to as the Commission, dated April 5, 1954 (60 M.C.C. 129), in Docket No. MC-F-5080, *Harry D. Zabarsky, et al.—Control—St. Johnsbury Trucking Company, Inc.—Purchase—Hinsch Transportation Co., Inc.* The notice of appeal herein was filed on March 11, 1955, and the Appellants' Jurisdictional Statement was served on July 23, 1955.

STATEMENT OF THE CASE

The Commission's order, entered in a proceeding under Section 5(2)[1] of the Interstate Commerce Act

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[1] 49 U.S.C. Section 5(2). Pertinent provisions of this section of the statute are as follows:

(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has

granted a joint application filed November 27, 1951, by St. Johnsbury Trucking Company, Inc., of St.

control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subparagraph (a) the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205(e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: Provided, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

Johnsbury, Vt., hereinafter termed "St. Johnsbury", and Hinsch Transportation Co., Inc., of New York, N. Y., hereinafter termed "Hinsch", whereby the two motor carriers jointly applied for the Commission's approval of the acquisition by St. Johnsbury of the operating rights of Hinsch for $75,000.00. St. Johnsbury, under appropriate certificates of public convenience and necessity from the Commission, operates as a common carrier by motor vehicle of general commodities, with certain exceptions, over regular routes, between Boston and Springfield, Mass., on the one hand, and, on the other, numerous points and places in Massachusetts, Vermont, New Hampshire and Maine; and over irregular routes between points in Vermont on the one hand, and, on the other, points in Rhode Island, Massachusetts, Connecticut and the New York metropolitan area. Hinsch is authorized to operate as a motor common carrier of general commodities, with certain exceptions, over regular routes between the New York metropolitan area, on the one hand, and, on the other, the Boston and Springfield, Mass., metropolitan areas serving numerous intermediate points on these routes.

As pointed out by the District Court, an extended hearing was held at which many competing carriers throughout the New York to Maine area appeared to protest the proposed acquisition.[2]

After hearing before an examiner of the Commission, and service of his proposed report, in which the application, in part, was recommended for approval, the majority of Division 4, Commissioner Johnson

[2] At these hearings a total of 1,652 pages of testimony and 52 exhibits were introduced and received by the Commission, all of which were part of the record in the District Court.

dissenting, denied the application (59 M.C.C. 419). Upon petition for reconsideration, the entire Commission issued a report on January 19, 1954, in which it approved the acquisition, subject to certain restrictions (59 M.C.C. 747). Petitions for reconsideration of the decision of the entire Commission were filed by certain protestants in February, 1954; as a result of which, the Commission, on March 15, 1954, reopened the proceeding and on April 5, 1954, issued a second report on reconsideration (60 M.C.C. 129) modifying the initial restrictions contained in the report of January 19, 1954.[3]

The finding of the Commission that the joint application should be approved as "consistent with the public interest" under Section 5, was based upon extensive subsidiary findings which the District Court held "clearly meet the requirements established under the statute." (128 F. Supp. 296, 299). These subsidiary findings included increased efficiency in operations as a result of the acquisition, because previous interchange arrangements on truck load and less than truck-load freight had not been satisfactory; that approval of the acquisition would afford a balanced operation in that Hinsch had a preponderance of

[3] On December 18, 1951, the Commission granted St. Johnsbury temporary authority under 49 U.S.C. Section 210a (b) to operate the Hinsch rights for a period of 180 days; this temporary authority was later extended and the District Court held that the extension beyond 180 days was an invalid exercise of authority by the Interstate Commerce Commission. (*Stone's Express, Inc* v. *United States*, 122 F. Supp. 955). Appeals to the United States Supreme Court from this decision were taken by the Commission, No. 9, October Term, 1955, and by St. Johnsbury and Hinsch, No. 14, October Term, 1955. A joint suggestion as to the mootness of this issue has been filed in this Court by all parties in the belief that the disposition of the instant case will make the Stone's Express, Inc., supra, case moot.

northbound traffic and St. Johnsbury a preponderance of southbound traffic; substantial operating and administrative economies, through the elimination of circuitous operations, unnecessary administrative personnel, and duplicate terminals and other facilities, would result. These efficiencies in operation would not impose any material increased operating cost upon the efficiently-managed business of St. Johnsbury. (59 M.C.C. 747 at 753).

The Supreme Court has recognized that it is a proper function of the Commission in administering the Interstate Commerce Act to take all possible steps to avoid waste in all matters affecting transportation.[4]

The Commission further found that the resulting increase in St. Johnsbury's fixed charges arising from the approval of the acquisition would not be contrary to the public interest because of St. Johnsbury's sound financial condition (59 M.C.C. 757). The Commission also found that with approval of the acquisition, more prompt handling of shipments would follow; a more comprehensive overnight through service would be available between all of New England and the New York metropolitan area; and that a single line service resulted in more efficient operations than interchange arrangements. (59 M.C.C. 747 at 754).

The reasonableness of the purchase price was thoroughly considered by the Commission and found not excessive; that while approval of the acquisition might have some effect upon competing carriers by

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[4] This Court has described that a "primary aim" of policy in transportation regulation, is "to secure the avoidance of waste. That avoidance as well as the maintenance of service is viewed as a direct concern of the public." *Texas* v. *United States*, 292 U.S. 522, 530.

reason of the fact that St. Johnsbury was a successful carrier and would become an efficient competitor, such did not preclude approval. In fact most of the protestant carriers had increased operating revenues and larger net incomes since 1948. It did not appear that they had lost or would lose sufficient traffic to affect their operations materially. The available traffic was ample to support continuance of the St. Johnsbury-Hinsch joint operations, as well as the operations of protestants (59 M.C.C. 747 at 758-59).

The District Court carefully reviewed the evidence to support these findings; determined that the record contained "conflicting evidence" which it was the province of the Commission, and not that of the court, to weigh; and found that "with one exception" the Commission's basic findings were supported by substantial evidence on the whole record.[5] (128 F. Supp. 296, 302).

The District Court further observed, "It is not possible here to hold that the statute 'consistent with the public interest' requires the basic findings urged by the petitioners." (128 F. Supp. 296 at 301).

[5] The one finding that the District Court stated to be without substantial support, is not specified in its opinion, and the Court added "We have not the slightest reason to infer that without this finding the Commission's ultimate conclusion would have been any different." This holding appears to be in accord with the decision of this Court in *Int. Com. Comm.* v. *Louis. & Nash. R.R.*, 227 U.S. 88, 98, where the Court said:

> • • • For the validity of the order does not necessarily depend upon the correctness of each of these findings, so that the breaking of one or many links by disproof would destroy the chain upon which the order depended. These findings are collateral and if correct might be confirmatory of the ruling, which, however, might still be sustained if some of these statements were eliminated. The question is whether there was substantial evidence to support the order.

It is submitted that these conclusions of the District Court were plainly correct and that this appeal presents no questions of substance warranting further review by this Court.

ARGUMENT

(a) Appellants Are Seeking a Second Review of the Evidence

Appellants disagree with the above holdings of the District Court and seek to have this Court reexamine the record to determine whether the District Court was correct.

This Court has indicated its attitude toward such requests. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474. In that case the Supreme Court spelled out the proper standard of review of administrative orders, and then continued (pp. 490-91):

> "Our power to review the correctness of application of the present standard ought seldom to be called into action. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied."

See also *National Labor Relations Board* v. *Pittsburgh Steamship Company,* 340 U.S. 498; *Radio Corporation of America* v. *United States,* 341 U.S. 412. In *National Labor Relations Board* v. *American National Insurance Company,* 343 U.S. 395, at page 410, this Court reaffirmed its prior statement that it "is not the place to review a conflict of evidence nor to reverse a Court

of Appeals because were we in its place we would find the record tilting one way or the other, though fair-minded judges could find it tilting either way."

This Court also noted that the rule had special application to cases where "a statutory standard such as 'good faith' can have meaning only in its application to the particular facts of a particular case"—a statement equally applicable to the statutory standard in Section 5(2)(b) of the Act of what is "consistent with the public interest."

Examination of the opinion of the District Court shows that it neither misapprehended nor misapplied the standard of review established by this Court in the *Universal Camera* case.

In the *Universal Camera* case this Court (making it clear that it was speaking of the standards set by the Administrative Procedure Act generally as well as by the Labor Management Relations Act, see 340 U.S. 474, at pp. 487, 490) emphasized the responsibility of a court called upon to enforce or set aside an administrative order. "Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function." 340 U.S. 474, at 490. What the reviewing court should do was clearly set forth (*id.* at 487-488):

> "Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitely precludes such a theory of review and bars its practice. The substantiality of evidence

> must take into account whatever in the record fairly detracts from its weight . . . Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view."

The District Court opinion involved herein demonstrates that the Court was proceeding in the light of the *Universal Camera* case, and fully understood the standards which it established. The District Court correctly added that although the evidence was "conflicting", it was the province of the Commission to weigh that evidence and not that of the Court; and found that "with one exception" the Commission's basic findings were supported by substantial evidence on the whole record.

It would appear that the District Court not only correctly comprehended its duty and function, but also properly discharged them.

(b) Affirmance Per Curiam Herein Would be in Harmony With Prior Action of This Court in Cases Involving Similar Legal Principles

Decisions of this Court in recent years have consistently affirmed by *per curiam* orders, decisions of the Interstate Commerce Commission involving motor carrier operations under the "grandfather" clause, "public convenience and necessity" sections, and acquisition provisions of Sections 206(a), 207(a), and 5(2)(b) of the Interstate Commerce Act [49 U.S.C. Secs. 306(a)(1); 307(a); and 5(2)(b)]. Among those decisions, all *per curiam*, are:

Crichton v. *United States*, 323 U.S. 684;
Jack Cole Co., Inc. v. *United States*, 324 U.S. 822;
Howard Hall Co., Inc. v. *United States*, 328 U.S. 818;
Motor Haulage Co., Inc. v. *United States*, 331 U.S. 784;
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Miami Transportation Co. v. *United States*, 332 U.S. 803;
Brady Transfer & Storage Co. v. *United States*, 335 U.S. 875;
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Acme Fast Freight, Inc. v. *United States*, 338 U.S. 855;
O. C. Wiley & Sons, Inc. v. *United States*, 338 U.S. 902;
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All States Freight, Inc. v. *United States*, 344 U.S. 804;
Newtex Steamship Corp. v. *United States*, 344 U.S. 901;
Malone Freight Lines v. *United States*, 344 U.S. 925;
Herrin Transportation Co., Inc. v. *United States*, 344 U.S. 925;
Luckenbach Steamship Co., Inc. v. *United States*, 347 U.S. 984, and
Pomprowitz v. *United States*, 348 U.S. 803.

Most of the points[6] urged by appellants in their

[6] Appellants failed to include within their "Notice of Appeal", as required by Rule 10(2)(c) of the Revised Rules of the Supreme Court, the alleged error by the District Court in failing to hold

notice of appeal and in their jurisdictional statement have been dealt with by this Court in the opinions cited.

(c) There Was No Procedural Error in the Commission's Conduct of the Case

1. Appellants argue (Jurisdictional Statement, p. 19) that the Commission erred in that the whole record, including the transcript of the hearings and exhibits, the reports of the examiner and Division 4, were not read, reviewed and considered by each and every member of the Commission before rendering their final decision. The objection recited above was not brought to the attention of the Commission before this action was instituted. The established rule of "primary administrative jurisdiction" requires that all controversies be thrashed out in the first instance before the administrative body in advance of attempted judicial review of its action. When the administrative process is completed the judicial power of the court begins and not before. *Nelson* v. *First National Bank,* 43 F. (2d) 30. In their petition for reconsideration and other relief, filed February 11, 1954, appellants herein sought reconsideration, oral argument, modification of the effective date, and vacatur of the Commission's order of January 19, 1954; but the contention that each and every member of the Commission had not reviewed the entire record prior to the entire Commission's decision of January 19, 1954 was not argued. Therefore it merits no consideration at this time by this Court. *Far Eastern Conference* v. *United*

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that the phrase "consistent with the public interest" requires an affirmative and basic finding that the proposed unified motor carrier service will be responsive to the transportation needs of the public. Regardless of this failure to comply with the cited Rule, this question is considered herein.

States, 342 U.S. 570, 574; *United States* v. *Tucker Truck Lines,* 344 U.S. 33; *General Transportation Company* v. *United States,* 65 F. Supp. 981, affirmed *per curiam,* 329 U.S. 668.

Furthermore this issue was argued separately and decided by the District Court by order of September 27, 1954, refusing to uphold the contention. No appeal to this Court was separately taken from that order.

(d) The Commission's Findings Were, as Held by the District Court, Entirely Adequate and Supported by Substantial Evidence

2. Appellants contend (Jurisdictional Statement, page 3) that the Commission failed to make adequate and basic findings required by the Interstate Commerce Act, and that such findings as made were not supported by substantial evidence.

It has been shown earlier herein that the findings of the Commission were held by the District Court to be entirely adequate (128 F. Supp. 296, 302).

The latitude that the Commission may exercise in the making of findings to support its decisions within the limits of the duty imposed upon it has been clearly explained and set forth by decisions of this Court. See *Alabama Great Southern R. Co.* v. *United States,* 340 U.S. 216, 227, 228.

That the Commission has even broader discretionary powers in deciding Section 5 matters than it has under other sections of the Act has been recognized and commented upon in decisions of the courts. For example, in *O. C. Wiley & Sons* v. *United States,* 85 F. Supp. 542 (affirmed *per curiam,* 338 U.S. 902), Judge Dobie stated in connection with a Section 5 case at page 545:

> It has been often recognized that Section 5 confers broader authority and greater administrative discretion than most any other section of the Act, and that the legislative history of the recent amendments to this section of the Act show Congressional intent to broaden the authority of the Commission. We are accordingly, of the opinion that the Commission's report and order, approving the transfer upon terms and conditions found to be just and reasonable and consistent with the public interest, should not be set aside.

Affirmance of this view is found in *Virginia Stage Lines* v. *United States,* 48 F. Supp. 79, 82, wherein the Court stated:

> It would be difficult to conceive of a statute which confers broader authority and greater administrative discretion than Section 5 of the Interstate Commerce Act. Under that section, the Commission may approve any merger, purchase, consolidation, lease, or contractual arrangement affecting motor carriers which it finds will be "consistent with the public interest". Moreover, except where rail carriers are involved, transactions within the scope of Section 5 may be approved by the Commission without a hearing. In the instant case, however, a public hearing was held at which the parties exercised the rights given them to introduce testimony and to examine witnesses.
>
> With regard to judicial review of the decisions and orders of the Commission, it is well settled that the court's function is exhausted where there is found to be a rational basis for the conclusions reached by that administrative body. *Mississippi Valley Barge Line Co.* v. *U. S.,* 292 U.S. 282, 54 S. Ct. 692, 78 L. Ed. 1260; *Rochester Telephone Corp.* v. *U. S.,* 307 U.S 125, 59 S. Ct. 754, 83 L. Ed. 1147. As was stated by the Supreme Court in

Alton R.R. Co. v. *U. S.*, 315 U.S. 15, 23, 62 S. Ct. 432, 437, 86 L. Ed. 586:

> The weighing of such evidence involves in part a judgment based on the characteristics of the highly specialized transportation service involved. Thus, as we have said, that function is peculiarly one for the Commission, not the courts.

See also *McLean Trucking Co.* v. *United States*, 321 U.S. 67, at 87, a Section 5 case, where this Court said:

> In short, the Commission must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the overall transportation policy. Resolving these considerations is a complex task which requires extensive facilities, expert judgment, and considerable knowledge of the transportation industry. Congress left that task to the Commission "to the end that the wisdom and experience of that Commission may be used not only in connection with this form of transportation, but its coordination of all other forms." 79 Cong. Rec. 12207. "The wisdom and experience of that Commission," not of the courts, must determine whether the proposed consolidation is "consistent with the public interest." Cf. *Interstate Commerce Commission* v. *Illinois Central R. Co.*, 215 U.S. 452; *Pennsylvania Co.* v. *U. S.*, 236 U.S. 351; *United States* v. *Chicago Heights Trucking Co.*, 310 U.S. 344; *Purcell* v. *United States*, 315 U.S. 381. If the Commission did not exceed the statutory limits within which Congress confined its discretion and its findings are adequate and supported by evidence, it is not our function to upset its order.

Appellants erroneously argue, without supporting authority, that Section 5(2)(b) of the Interstate Commerce Act [49 U.S.C., Section 5(2)(b)] requires an affirmative and basic finding that the proposed unified motor carrier service will be responsive to the transportation needs of the shipping public; in other words, must satisfy a "public need". The District Court adequately resolved this argument in distinguishing between the statutory language found in Section 5 and the "public convenience and necessity" sections of the Act. (128 F. Supp. 296 at 301). Moreover, the Commission reviewed and summarized the evidence of representatives of shippers in its decision on reconsideration (59 M.C.C. 747 at 757). The Commission further found that the acquisition by St. Johnsbury would not materially affect appellants' operations. (59 M.C.C. 747 at 758).

It has been heretofore disclosed that the District Court concluded that all the important basic findings made by the Commission were supported by substantial evidence on the whole record; and the sole finding of fact mentioned by the majority and concurring opinions, as not having substantial support, does not warrant "marching the king's men up the hill and then marching them down again." (129 F. Supp. 296 at 302).

The Congress of the United States enacted Federal motor carrier legislation in 1935, and since that time the Interstate Commerce Commission has considered a vast number of proceedings under Section 5(2)(b) of Part I of the Interstate Commerce Act, and its predecessor Section 213 of the Motor Carrier Act of 1935 (49 U.S.C. Section 5(2)(b), Section 313 (Repealed by Transportation Act of 1940, 54 Stat. 924). Criteria

for the exercise of the administrative authority in the disposition of these cases by the Commission has been established clearly by the Courts. See cases cited at page 11 of this motion. The Commission patently acted herein within the boundaries of these decisions.

CONCLUSION

For the foregoing reasons, it is submitted that the decision of the District Court is correct, and that the alleged questions Appellants desire to present to this Court are so unsubstantial as not to need further argument. The judgment of the District Court should accordingly be affirmed.

Respectfully submitted,

S. HARRISON KAHN,
Attorney for
St. Johnsbury Trucking Company,
and Hinsch Transportation Co. Inc.,
Interveners.

August 20th, 1955.

Certificate of Service

I hereby certify that I have served a copy of this motion upon the following Counsel of record by depositing a copy of this motion in the United States mail, this 20th day of August, 1955, with first-class

postage prepaid, addressed to each Counsel at his post office address:

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355812—55

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 265

M & M TRANSPORTATION COMPANY ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1 (c), of the Revised Rules of this Court, the United States and the Interstate Commerce Commission, appellees, move that the judgment of the district court be affirmed.

This is a direct appeal from a final judgment, entered January 25, 1955 by a three-judge district court convened pursuant to 28 U. S. C. 2284, 2325, which dismissed a complaint seeking to set aside an Interstate Commerce Commission order authorizing one motor carrier to acquire the operating rights of another. Appellants are competing motor carriers.

The Commissioner's order, entered in proceedings under Section 5 (2) of the Interstate Commerce Act, authorized St. Johnsbury Trucking Company ("St. Johnsbury") to purchase the operating rights of Hinsch Transportation Company ("Hinsch"). *St. Johnsbury Trucking Co.-Pur.-Hinsch Transp. Co.*, 59 M. C. C. 747. St. Johnsbury proposed to combine its established operating authority to carry general commodities over regular routes between Northern New England and Boston and Springfield with Hinsch's authority to carry these commodities between the latter cities and New York, so as to provide scheduled overnight through service between Northern New England and New York.

The Commission found, as required by Section 5 (2) (b), that the acquisition was "consistent with the public interest" and that the resulting operations "would clearly be to the advantage of the shipping public" (pp. 758, 759). These ultimate findings rested on the following subsidiary findings, among others: that St. Johnsbury's existing interchange of freight at Boston was unsatisfactory (p. 753); that the combination of Hinsch's predominantly northbound traffic with St. Johnsbury's predominantly southbound traffic would produce a balanced operation and would effect substantial operating and administrative economies (p. 753); that Hinsch's operations, while less than the maximum authorized by its certifi-

cate (p. 757) were "commensurate with its ability, resources, and facilities" and produced "substantial gross operating revenues" of over $200,000 annually (p. 758); that the overnight through service proposed was responsive to shippers' requests (p. 757); and that the purchase price was reasonable (p. 757). The Commission noted the possibility that St. Johnsbury's greater efficiency and aggressiveness would make it "a more formidable competitor" (p. 758), but concluded that material harm to competing motor carriers was unlikely in view of the facts that (1) net incomes of the latter had increased during 1948 to 1951, and (2) the volume of available traffic was sufficient to support those carriers' operations and St. Johnsbury's proposed operations (p. 759).

On appeal the district court, in a careful opinion by Circuit Judge Magruder, affirmed the Commission's order. The court held (Jurisdictional Statement, pp. 28–30) that the statutory finding of consistency with the public interest was adequately supported by the Commission's underlying findings, and that "all the important basic findings made by the Commission are supported by substantial evidence on the whole record" (*id.*, p. 33). The court held that, contrary to appellants' contention, the statute did not require affirmative findings that a public need existed for the unified service, that existing service was inadequate, and that no new service was created (*id.*, pp. 30–31).

ARGUMENT

1. Appellants' principal contention (Jurisdictional Statement, pp. 10–18) is that the Commission's underlying findings are insufficient to support its ultimate finding that the acquisition will be "consistent with the public interest." Specifically, they contend (Jurisdictional Statement, pp. 10–12) that under Section 5 (2) (b) the Commission may not find "consistency with the public interest" unless it affirmatively finds that there is a public need for the proposed combined service. We submit, however, that the Act does not require the Commission to find public need in order to approve an acquisition as "consistent with the public interest."

The Act carefully distinguishes between "consistent with the public interest" and "public convenience and necessity," and the concepts obviously are not the same.[1] "Public convenience and necessity" is the standard prescribed for the issuance of new certificates of operating authority under Section 207, and in order to satisfy that standard the Commission *is* required to find public need, *i. e.*, that the existing service is inadequate.

[1] Contrary to appellants' contention (Jurisdictional Statement, pp. 9–10), the court did not construe "consistent with" the public interest to mean "not inconsistent" therewith. The court specifically pointed to a number of Commission findings which showed that the public would benefit from the acquisition, and that serious injury to competitors was unlikely (Jurisdictional Statement, pp. 28–30).

Appellants concede (Jurisdictional Statement, p. 16), as indeed they must in light of *McLean Trucking Co.* v. *United States,* 321 U. S. 67, 86, that the Commission is not required to find that the existing service is inadequate in order to approve an acquisition under Section 5 (2) (b). This being so, we submit that both the Commission and the district court correctly construed that Section as requiring only a showing that the public will benefit from the proposal, and that such public benefit outweighs any probable injury to competing carriers. As we have noted (*supra,* pp. 2–3), the Commission here made precisely those findings, and they were sufficient to support its ultimate finding that the acquisition is "consistent with the public interest."[2]

Appellants suggest (Jurisdictional Statement, pp. 13–14) that the Commission is required to find that "there will be no adverse effect on competing carriers." But any acquisition which results in strengthening one carrier inevitably

[2] Appellants argue (Jurisdictional Statement, pp. 11–12) that the Commission departed from its prior settled construction of the Act that "need" must be shown in order to approve an acquisition. But, as Judge Magruder pointed out (Jurisdictional Statement, p. 31), the *Pacific Intermountain* case upon which appellants rely was modified on reconsideration, and its scope was still further restricted by a subsequent Commission decision. In any event, it is settled that an otherwise valid agency order is not invalid merely because it is inconsistent with other agency decisions. See cases cited by Judge Magruder, Jurisdictional Statement, p. 31.

will have some adverse effect on competitors. All that the Commission is required to do is to weigh the extent of such adverse effect against the benefit to the public. *Cf. McLean Trucking* case, *supra,* pp. 87, 88; *Baltimore Transfer Co.* v. *Interstate Commerce Commission,* 114 F. Supp. 558 (D. Md.), affirmed, 346 U. S. 890, rehearing denied, 347 U. S. 908. Here the Commission did just that, and concluded that although St. Johnsbury would probably be "a more formidable competitor" after the acquisition, competing carriers were unlikely to sustain material harm because of their own strong financial position and the sufficiency of available business. The Commission then balanced these facts against the improved service which would result, and concluded that the public interest would be served by approving the acquisition. The Act does not require the Commission to do anything more.

2. In holding that "all the important basic findings" of the Commission are "supported by substantial evidence on the whole record," the court noted that one finding, which it did not identify, "appears to be without substantial support" (Jurisdictional Statement, p. 33). The court stated (*ibid.*), however, that it did not have "the slightest reason to infer that without this finding the Commission's ultimate conclusion would have been any different," and further stated that even without that one "questionable

finding" it would uphold the order. Appellants admit (Jurisdictional Statement, p. 18) that the absence of substantial evidence to support an immaterial finding will not invalidate the order, but they contend that since the finding was not identified it is impossible to determine whether it was immaterial. However, since the court held that all the "important" findings were supported by substantial evidence, it plainly viewed the single unsupported finding as immaterial. Under such circumstances, it properly upheld the order, since even "without such findings, there would still be a basis in the record for the Board's [Commission's] conclusions." *National Labor Relations Board* v. *Newport News Co.*, 308 U. S. 241, 247.

3. Finally, appellants argue (Jurisdictional Statement, pp. 19–21), that the court erred in quashing their requests for admissions that the Commissioners had not read, reviewed and considered the whole record. Appellants' complaint in the district court contained such an allegation, and the Commission's answer admitted that the Commissioners had not read the record, but denied that it had not been reviewed and considered.

Clearly, it was not incumbent upon each of the individual Commissioners to read the whole record himself; he properly could have the evidence "sifted and analyzed by competent sub-

ordinates." *Morgan* v. *United States*, 298 U. S. 468, 481. The Commission's report stated that it was based "[o]n the record presented," and the Commission denied the charge that it had not "reviewed and considered" the whole record in reaching its decision. To permit appellants further to examine into the "extent to which the Secretary [Commissioners] examined the evidence," *Morgan* v. *United States*, 304 U. S. 1, 18, would constitute the same kind of "prob[ing of] the mental processes" of an agency which this Court condemned in the fourth *Morgan* case as disrespectful of the "integrity of the administrative process." *United States* v. *Morgan*, 313 U. S. 409, 422. Courts repeatedly have rejected such attempts by litigants to inquire into the internal workings of administrative agencies,[8] and the court below properly rejected appellants' attempt to do so in this case.

CONCLUSION

For the foregoing reasons, we submit that the decision below is correct and that this appeal presents no substantial questions. It is therefore

[8] *E. g.*, *Willapoint Oysters* v. *Ewing*, 174 F. 2d 676 (C. A. 9); *National Labor Relations Board* v. *Baldwin Locomotive Works*, 128 F. 2d 39 (C. A. 3); cf. *Norris & Hirshberg* v. *Securities and Exchange Commission*, 163 F. 2d 689 (C. A. D. C.); *National Labor Relations Board* v. *Ford Motor Co.*, 118 F. 2d 766 (C. A. 9).

respectfully submitted that the judgment of the district court should be affirmed.

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AUGUST 1955.

U. S. GOVERNMENT PRINTING OFFICE: 1955

3/30

No. 765

FILED
SEP 12 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

M & M TRANSPORTATION COMPANY and STONE'S EXPRESS, INC.,

Appellants,

against

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees,

and

ST. JOHNSBURY TRUCKING COMPANY, INC. and HINSCH TRANSPORTATION CO., INC.,

Intervener Appellees.

On Appeal from the United States District Court for the District of Massachusetts

REPLY TO THE MOTIONS TO AFFIRM

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On Appeal from the United States District Court for the District of Massachusetts

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REPLY TO THE MOTIONS TO AFFIRM

Appellants submit this brief, pursuant to Rule 16(3) of the Revised Rules of the Supreme Court of the United States, in opposition to the motions to affirm filed by Appellees and Interveners herein.

I

"Public need" and "adequacy of existing service" are separate and distinct concepts.

The Appellees contend (Appellees' Motion to Affirm, pp. 4-5) that a finding of "public need" is not a prerequisite for approval of an application under Section 5(2)(b) of the Interstate Commerce Act (49 U. S. C. 5(2)(b)). This argument is grounded upon a specious syllogism. For their major premise, Appellees define "public need" to mean "inadequacy of existing service".[1] For their minor premise, Appellees rely upon the decision by this Court in *McLean Trucking Co.* v. *United States,* 321 U. S. 67, 86, that the Commission need not find that existing service is inadequate in order to approve an application under Section 5(2)(b). *Ergo,* say the Appellees, the Commission need not find public need in order to approve a Section 5(2)(b) application.

Plainly, the major premise is fallacious. In *Interstate Commerce Commission et al.* v. *Parker, etc.,* 326 U. S. 60, 69-70, this Court recognized a distinction between "public need" and "adequacy of the existing service". The Commission, too, has consistently treated "public need" and "adequacy of existing service" as two separate and distinct concepts. Thus, in *Pan-American Bus Lines Operation,* 1 M. C. C. (F) 190, 203, the Commission delineated three essential findings in a Section 207 case:

> "* * * new operation or service will serve a useful public purpose, responsive to a public demand or need; whether this purpose can and will be served as well by existing lines or carriers; and whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers. * * *"

[1] Appellees state (Motion to Affirm, p. 4) "public need, i.e., that the existing service is inadequate."

See, too,

Kansas City S. Transport Company, Inc., Common Carrier Application, 10 M. C. C. 221, 234-238.
White Circle Line, Common Carrier Application, 16 M. C. C. (F) 516.

The significant facts are these: the Interstate Commerce ommission has defined "public need" as "public demand" nd has consistently held that a proposed service will not tisfy the statutory criteria unless it "will serve a useful ublic purpose, responsive to a public demand".[2]

The statutory scheme is obvious. In a Section 207 case, e Commission must affirmatively find all of the following cts: (1) public need; and (2) inadequacy of existing rvice of the same kind as applicant proposes; and (3) sence of adverse effect on competing carriers.

In a Section 5(2)(b) case, the Commission must affirmaely find only one fact: public need for the service. It ed not *find,* though it must *weigh,* the "considerations" t forth in Section 5(2)(c) of the Act, i.e., adequacy of isting service, among other things. Hence, if the Comssion weighs the described "considerations" and makes findings as to adequacy of existing service, or indeed, ls to find that existing services are inadequate it may, vertheless, approve a Section 5(2)(b) application so long there is a public demand or need for the proposed service.

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[2] As the Jurisdictional Statement (pp. 11-12) points out, the prinle enunciated in *Pacific Intermountain Express Co.—Control and rchase—Keeshin Freight Lines, Inc. etc.,* 57 M.C.C. (F) 341 d, 57 M.C.C. (F) 467 was never modified. The appellees' statent (Motion to Affirm, p. 5) that the scope of this decision was ther restricted in a subsequent decision is clearly wrong. See, *D. Gorman—Control; Chicago Express, Inc.—Purchase—Huck's nsfer, Inc.,* 58 M.C.C. 812 (no printed report) in which the Comsion said that there must be substantial evidence of public need upport an order approving an application under Section 5(2)(b). eed, the National Transportation Policy (54 Stat. 899) describes he principal objective of regulation a transportation system "adee to meet the needs of the commerce of the United States * * *."

This is so because Section 5(2)(b) does not require that existing carriers be accorded an opportunity to provide the proposed service even though they are in a position to do so. On the other hand, in a Section 207 case, if existing facilities are adequate, the competing carriers must be accorded the right to provide the proposed service if the evidence shows that such carriers are "in a position to render this complete service." *Interstate Commerce Commission* v. *Parker,* 346 U. S. 60, 69.

The distinction between "public convenience and necessity" and "consistent with the public interest" was drawn by the Commission in *Baggett Transportation Company—Purchase—Bishop,* 36 M.C.C. 659, 663-664; when the Commission said:

> "Section 206 provides the exclusive method and the sole standards by and under which we may issue a certificate. The primary standard there established is the existence of public convenience and necessity. The standard for our approval of a transaction under section 5 is consistency with the public interest. The one is not necessarily the equivalent of the other. Public convenience and necessity, as we have frequently defined it, ordinarily requires a higher degree of proof than mere consistency with the public interest, and usually contemplates an entirely distinct set of circumstances."

One thing is clear: while "consistency with the public interest" does not require the character or quantum of proof requisite in a Section 207 case, both sections of the law require an affirmative finding, supported by substantial evidence, of "public need."

Appellees suggest (Appellees' Motion to Affirm, p. 5) that "a showing that the public will benefit from the proposal" is the sole standard applicable in this case. If that be so, then the Commission's order must be vacated because there was neither a finding to that effect nor any evidence

to support such a finding. The appellees' attempted distinction between "public need" and "public benefit" is a fruitless exercise in logomachy.[3]

II

All of the errors were properly urged before the Commission.

Appellant will deal briefly with only the most important errors of law and fact which characterize Interveners' Motion to Affirm.

Interveners' charge (Interveners' Motion to Affirm, pp. 11-12) that appellants' Notice of Appeal is deficient is answered by the language of Questions 2, 3 and 5.

Appellants never urged the contentions ascribed to them by Interveners (Interveners' Motion to Affirm, pp. 13-15). Appellants have argued, and again insist, that the Commission exceeded "the statutory limits within which Congress confirmed its discretion" and its findings "are not adequate and supported by evidence." *McLean Trucking Company, Inc.* v. *United States,* 321 U. S. 67, 87.

Appellants did seasonably urge the objection that the record was not read, reviewed and considered (Interveners' Motion to Affirm, p. 12). Not only did appellants' petition for reconsideration charge a violation of the Administrative Procedure Act, but implied that only the failure to read, review and consider the whole record could justify the decision (pp. 6 and 10 of Petition for Reconsideration). In any event, this objection cannot be waived. It is not a mere procedural irregularity.

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[3] Appellees' statement (Appellees' Motion to Affirm, p. 5) that Section 5(2)(b) requires "only a showing * * * that such public benefit outweighs any probable injury to competing carriers" is clearly incorrect. This is merely the fourth factor in a Section 207 case which the Commission added in *All American Bus Lines, Incorporated,* Common Carrier Application, 18 M.C.C. (F) 755, 777.

If it is unreasonable or even shocking to expect the Commission to read, review and consider the records before it, relief must be sought in Congress and not legislated by the Commission or even the Courts. Cooper, "Administrative Law: Let Him Who Hears Decide," 41 ABAJ 705.

Interveners' statement (Interveners' Motion to Affirm, p. 13) that review on this issue is foreclosed by failure to appeal from the order of the District Court quashing appellants' notice to admit, reveals a failure to recognize a non-appealable intermediate order.

CONCLUSION

For all of the reasons urged in the Jurisdictional Statement and this Reply, the Motions to Affirm should be denied.

Respectfully submitted,

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September 9, 1955.

No. 265. M. & M. TRANSPORTATION CO. ET AL. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the District of Massachusetts. *Per Curiam:* The motions to affirm are granted and the judgment is affirmed. *Herbert Burstein* for appellants. *Solicitor General Sobeloff, Assistant Attorney General Barnes, Daniel M. Friedman, Samuel R. Howell* and *Leo H. Pou* for the United States and the Interstate Commerce Commission, and *S. Harrison Kahn* for the St.

October 17, 1955. 350 U. S.

Johnsbury Trucking Co., Inc. et al., appellees. Reported below: 128 F. Supp 296.